IN THE SUPREME COURT OF FLORIDA

JAMES FLOYD

Appellant,

v. CASE NO. 72,207 .

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
Assistant Attorney General
Florida Bar No. 160260
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/jmw

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SUMMARY OF THE ARGUMENT

As to Issue I: As the state reads the record, the black prospective juror peremptorily excused was Bentley. The state gave a reasonable race neutral explanation for excusing him which fit with the answers he had given during voir dire. Appellant challenged neither the reasonableness nor the accuracy of the reasons given for the excusal of the juror.

Appellant's attempt to inject the matter of the propriety of using a juror's "weakness" on the death penalty has been procedurally defaulted by his failure to raise it below.

As to Issue 11: The full context of the record shows that Hendry did not have a presumption that death was appropriate. He had indicated that he could follow the law at the beginning of the voir dire. He had affirmed the importance of background and character in the sentencing determination. He may well have understood appellant's counsel's question about the appropriateness of death in the premeditated murder situation as referring to premeditated murderers who had pounded on the system.

The kinds of answers Hendry gave are readily distinguishable from cases where this court has found error in refusing to excuse a prospective juror for cause. He articulated no presumption in favor or death. Nor, did he express any inability to follow the law. There is no basis for this court to overrule the highly fact based determination that the trial court made when appellant asked to excuse Hendry for cause.

As to Issue III: The court did not error in precluding evidence that the victim was opposed to capital punishment. It is not evidence relevant to the offender's character, background or experience or any aspect of the crime. This court's prior opinion in the case can not be said to have decided that it is a mitigator because the issue was not before the court. It is not relevant to retribution because the need for retribution served by capital punishment is society's not the particular individuals touched by the murder. The rule for which appellant's argument contends is forbidden by the logic of Booth, infra and its progeny.

As to Issue IV: The evidence of appellant's threat to "get" Greg Anderson was relevant to prove the burglary. Proof of the burglary was necessary for the state to prove the aggravating factor set out in Section 921.141(5)(d). The trial court did not abuse his discretion in permitting proof of this fact.

As to Issue V: This court resolved the admissability of the flight statement against appellant in the prior appeal in this case. The trial court did not abuse his discretion in permitting cross-examination of Snell regarding his knowledge of appellant's criminal history after he injected the assertion that he never knew appellant to have been in any kind of trouble and in permitting the introduction of criminal history thereafter, subject to his limiting instruction.

As to Issue VI: The opinions offered by the officers had been permitted by the trial court as opinions of police officers.

Appellant never challenged either their qualifications as officers or whether the matters to which they testified fell within their experience. There was no abuse of discretion in the trial court's ruling on these evidentiary questions. Established case law has recognized that police officers may give opinions about matters of which they have a working knowledge which shows in the testimony despite the absence of a finding of expertise.

As to Issue VII: The trial court only prohibited appellant's counsel from reading the aggravating factors that were not going to be read from the jury. This limitation did not preclude him from making the argument he now suggests to this court and it certainly did not transgress on the constitutional doctrine insuring him the right to present evidence pertinent to his background, character, experience or any circumstance of the offense. There is no basis for concluding that the court below abused his discretion in precluding appellant's argument from going outside of the jury instructions that were to be given.

As to Issue VIII: This court left the finding of the pecuniary gain factor undisturbed in the prior appeal in this case. There is no good reason proffered for disturbing it now. The facts of the case are consistent only with theft as the motive. Unlike the cases cited in support of reversal on the question of pecuniary gain, there is no evidence in the record to suggest the existence of another motive like rape, a lover's passion or convenience of escape.

The facts which prompted the initial finding and affirmance of the establishment of the heinous, atrocious or cruel aggravating factor are still present. And, the instant findings are substantially the same as the prior findings on this issue. That death by stabbing may not be uncommon or not always accompanied with other acts to set it apart from the norm does not control the instant case. And, the instant finding is in keeping with such findings in similar situations.

As to Issue IX: The trial court carefully followed this court's instructions and considered everything that was proffered as mitigating. Both the written and spoken sentencing orders make it very clear that there was no refusal to consider evidence proffered as mitigating

ARGUMENTS

ISSUE I

WHETHER THE COURT ERRED PERMITTING THE STATE'S PEREMPTORY CHALLENGE TO PROSPECTIVE JUROR BENTLEY TO STAND IN LIGHT OF THE FACT THAT HE WAS THE ONLY REMAINING BLACK AND THE STATE'S USE OF ITS PEREMPTORY HAD BEEN CHALLENGED?

Appellant's argument, while acknowledging some ambiguity in the record, takes the position venireman Edmonds was black and that the assistant state attorney excused him without giving a race neutral reason which was supported by the record. He asserts three theories that support his conclusion that there must be a reversal. There is the an equal protection claim pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), a Sixth Amendment fair cross section claim, the only claim actually presented to the trial court and a state constitutional law claim arising out of State v. Neil, 457 So.2d 481 (Fla. 1984) and its progeny. Appellant's argument is fatally flawed because it reasons what the state sees as an erroneous premise, that Edmonds was black. The inference that the state draws from the record is that the last black venireman was James Bentley and that the state's reasons for excluding him were race neutral, reasonable and supported by the record.

As the state reads the record, it was James Bentley whom the state excused and whose excusal prompted the objection that is at the root of this claim on appeal. The state gave a reasonable race neutral reason which was supported by the record in excusing

this juror. In impaneling the venire for voir dire, the trial judge assigned them to various rows. (R. 553) Carolyn Tinnen was assigned to the first row. (R. 553) Her seat in the first row was designated A-1 with letters and numbers assigned to the various seats. (R. 663-664) Susan Hester was also in this row. (R. 553) Carolyn Tinnen and Susan Hester were the first two prospective juror peremptorily excused by the state in response to the trial court's invitation to exercise its peremptories in the first row. (R. 668-669) When allowed to move to the second row, the assistant state attorney peremptorily excused prospective juror B-5, Mrs. Jamison. (R. 669) She had been assigned to second row when the trial court had first assigned the prospective jurors their seats. (R. 553) The court then gave appellant his opportunity to exercise his peremptories on the first two rows of jurors. (R. 669-670) The court then directed the prosecution to exercise its peremptories with respect to the third row. (R. 670) The jurors assigned to the third row were: (1) John Lobniewski, (2) Carl Stabell, (3) Peter Marchetti, (4) Steve Armendinger, (5) James Bentley, (6) Lee Hendry and (7) Billie Mierski. (R. 553) The state's response to the court's invitation was as follows:

> MR. MCGARRY: Okay. Okay. Third row, first one, Mr. Edmonds and -- Right?
>
> MR. FEDERICO: C-1 and C-5, your Honor.
>
> MR. MCGARRY: Tinnen and Edmonds.
>
> THE COURT: All right. Any others on that row?
>
> MR. MCGARRY: (Indicates negatively) (R.670)

It was just following this exchange that appellant made his objection. (R. 670)

The record is clear that Mr. McGarry was simply mistaken as to the names of the prospective jurors he had stricken. Ms. Tinnen had already been stricken and she had been seated on the first row. Mr. Edmonds had not been assigned to the third row at all. He had been assigned to the fourth row. (R. 553) It was not the only time during voir dire he would show confusion over jurors names. At one point he had referred to Mr. Bentley as being in row two. (R. 673) Then a couple of lines later he refers to Mr. Bentley as being C-4. (R. 673) He was also confused about the number of peremptories he had used counting eight where the court had only counted seven. (R. 673-674) The first time the court listed the individuals he thought were on the jury he included Edmonds until told that he had been excused. (R. 673) Even appellant's counsel was confused as to names as he continued to call one of the remaining prospective jurors Tinnen despite her earlier excusal. (R. 675) Other jurors assigned to the third row had been given the C-# designation. Mr. Hendry and Mr. Marchetti were referred to as numbers C-3 and C-6 respectively by appellant's counsel. (R. 671)

Bentley had taken the position that while he supported capital punishment in theory but was of the opinion that as a practical matter it had "lost its entire meaning." (R. 604) After mentioning publicity about how the capital punishment system has become bogged down, the prosecutor again asked if this would

affect his ability to be an impartial juror. Bentley replied, "I'm afraid it would slant me a little." (R. 604) Next pressed on whether his opinion prevent him from being a fair and impartial juror, Bentley replied, "I hate to use those words, but its almost like that." (R. 604)

When pressed for an explanation on why the only remaining black person on the panel after the exercise of challenges for cause had been excused, the prosecutor said, "I think he said that he would be satisfied for twenty-five years and that's punishment enough. You know, I though that was enough." (R. 671) The explanation is reasonable, race neutral and fits with the responses Bentley during voir dire. Appellant neither challenged the accuracy of the description of the response given by the prosecutor nor suggested that there was anything about the state's reasoning that was dishonest or a smoke screen for a racist motive to excuse this juror.

Appellant's attempt to depict the excused juror as Edmonds simply does not fit with the totality of the record. Edmonds, as appellants argument points out, made no comments during voir dire that even remotely suggested the explanation given when the excusal was challenged. It simply does not make sense to think that counsel would not have been jumping up and down if it had been his understanding at the time that the peremptory had been directed at Edmonds. It also requires the court to believe that an assistant state attorney entrusted with a death penalty hearing did not have enough sense to at least try to tie his

excusal to something the prospective juror had said. The full context of the record is against the position that appellant's argument takes. Appellant's argument has failed to demonstrate error in the state's use of the peremptory at issue here.

Apparently anticipating the state's line of argument, appellant also includes an argument to the effect that being weak on capital punishment is not a sufficient basis for excluding prospective jurors citing Brown v. Rice, **693** F.Supp. **381** (W.D.N.C. **1988).** The position does not enjoy the status of established law. Brown v. North Carolina, **479** U.S. **940, 107** S.Ct. **423, 93** L.Ed.2d **373 (1986)** (opinions on denial of certiorari). Since the claim was not presented to the trial court, it has been procedurally defaulted. Castor v. State, **365 So.2d 701, 703** (Fla. **1978).** The state urges the court to make a "plain statement" so finding in light of Harris v. Reed, **489** U.S. ___, **109** S.Ct. **1083, 103** L.Ed.2d **308 (1989).**

ISSUE II

WHETHER THE COURT ERRED IN REFUSING APPELLANT A CHALLENGE FOR CAUSE TO EXCUSE PROSPECTIVE JUROR HENDRY?

Appellant takes the position that he should have been permitted to challenge prospective juror Hendry for cause. An analysis of the record show that the trial court did not error in concluding that Hendry did not qualify for an excusal for cause.

In his initial address to the prospective jurors the trial court said:

> THE COURT: In this particular proceeding, if you're selected as a juror, I want you to understand that every one here in this entire courtroom has their opinion concerning the death penalty. There are those in the room, perhaps, that are in favor of the death penalty and those in the room that are opposed to the death penalty, and it certainly is not unlawful or improper for anyone to hold such an opinion. The court understands that.
>
> I am now going to ask you this and ask you that. Truthfully answer this and all the other questions that are asked by the Court and counsel. If you have an opinion, can you set that opinion aside and make a decision based on the law and the facts, the law as instructed to you by the Court and the facts that are presented to you, either in the form of exhibits or in the form of testimony, because the oath of a juror must be that you will make a decision based on the facts and the evidence, and it alone, and not go outside the facts, the evidence. So my question is: Do any of you hold opinions so strongly that you would be unable to confine yourself to the facts in evidence on the issue of the death penalty?
>
> (R. 564-565) (emphasis supplied)

He followed up on this statement with individual prospective jurors who, apparently, had indicated that they could not follow the law. (R. 565-566) And, he repeated his question in abbreviated for and asked whether anyone would not be able to follow the laws with regard to the imposition of the death penalty. One more prospective juror answered. Mr. Hendry was not among the prospective jurors who had indicated that he could not follow the law in this regard.

While appellant's argument points to Hendry's answers to his voir dire questions, it ignores the context in which they were found. Just prior to turning to Hendry, appellant's counsel had been talking with prospective juror Banks as a follow up to his questioning prospective juror Riedel about what kind of evidence she would be looking for in mitigation. (R. 648) She indicted that she thought that the offender's history and background ought to play a role in the sentencing determination. (R. 648-649) Hendry indicated that he would answer the same way. The state also does not read the record as supporting the inference that he favored death for all premeditated murders. He had just finished talking about premeditated murders by persons pounding on the system. (R. 649-650) He may well have understood Love's remark " . . . in all cases of those premeditated, finding death warranted?" as referring back to individuals who were "pounding on the system." Factually, the record just does not support the claim that Hendry had a preconceived idea or presumption regarding the appropriate punishment for appellant.

Review of a trial court's decision not to permit a challenge to a prospective juror for cause is pursuant to an abuse of discretion standard as trial courts enjoy broad discretion in ruling on challenges for cause. Singer v. State, 109 So.2d 7, 23 (Fla. 1959); Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929); Sikes v. Seaboard Coast Line R. Co., 487 So.2d 1118, 1120 (Fla. 1st DCA 1986). Decisions about a given juror's ability to give both parties a fair trial are highly fact intensive. Thus, the United States Supreme Court treats the decision of whether a juror will let his personal views on capital punishment prevent or substantially impair his ability to apply the law as a question of fact. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This court should not disturb this particularly fact intensive determination by the trial judge who was there listening to the tenor of the questions and answers as they were given.

Hendry's answers are certainly nothing like those of Johnson in Hill v. State, 477 So.2d 553, 555 (Fla. 1985) where he specifically affirmed that he had a presumption in favor of death. Nor, are there any answers from Hendry like those of Lopez in Moore v. State, 525 So.2d 870, 872 (Fla. 1988) telling counsel that the prospects of release in the event of an insanity acquittal would probably prevent him from following the law. Unlike Hill and Moore, this record does not "clearly reflect" that the prospective juror did not possess the requisite state of mind. There is nothing her to suggest that this trial judge did properly follow the law in evaluating Hendry's fitness to serve.

ISSUE III

WHETHER THE COURT ERRED IN PRECLUDING THE WITNESS ANN SHIRLEY ANDERSON FROM TESTIFYING THAT HER MOTHER DID NOT BELIEVE IN CAPITAL PUNISHMENT?

Appellant asks the court to start down a slippery slope and allow evidence other than that which is needed to make the kind of individualized sentencing determination that our law contemplates. He urges the court to begin allowing opinions from those with connections to a case on whether death is appropriate regardless of whether their information touches on an aggravating factor or some aspect of the offender's character, background or experience. Nothing in the way this case was handled made Anderson's testimony about her mother's opinion on capital punishment relevant evidence.

Appellant's argument proceeds from the proposition that it is error to exclude relevant mitigating evidence. This is certainly a truism. But, the kind of evidence which is considered relevant for purposes of mitigation of a death sentence is evidence which is relevant to the defendant's character, background and record or the circumstances of the offense. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 973, 988, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)(plurality opinion); Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("justice generally requires

. . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." internal quotation citations omitted). It is the kin of evidence which "has some bearing on the defendant's 'personal responsibility and moral guilt.'" Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) quoting Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)

Appellant's argument urges the court to conclude that the immediate victims' beliefs about capital punishment were relevant mitigating evidence. This court has clearly recognized, with one exception that is not applicable here, that evidence which is relevant to the defendant's character, background and record or the circumstances of the offense is the only type of non-statutory mitigating evidence which is relevant. Accordingly, in Jackson v. State, 530 So.2d 269, 274 (Fla. 1988) cert. denied 109 S.Ct. 882 (1989) this court ruled that the exclusion of proffered testimony about the philosophy of the present parole board not to grant parole to defendants not convicted of capital offenses was not error because it did not "concern the appellant's character. . . ."

There is only one exception to this general principle and that is that the court as sentencer or the jury in its advisory rule may consider the disparate treatment of an equally culpable accomplice in mitigation. The origin of the rule seems to be in Slater v. State, 316 So.2d 539 (Fla. 1975), a case ante-dating

the extensive development of rules relating to non statutory mitigating evidence in capital cases. And, the court seems to have concluded that the rule was required by Furman v. Georgi , 408 U.S. 238 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). 316 So.2d at 542 But, as Gregg later explained the existence of discretion about whom to seek the death penalty for does not run afoul of Furman. 428 U.S. at 199; cf. Brogdon v. Butler, 824 F.2d 338, 343 (5th Cir.), cert. denied, 108 S.Ct. 13 (1987)(refusal to admit evidence of co-indictee's life sentence not unconstitutional because not relevant to defendant's character, record or circumstances of the offense).

Nevertheless, the rule survives. See, e.g., Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 108 S.Ct. 733 (1988). The reason for the rule is that the sentencer should be permitted to determine that similarly situated offenders should not be treated differently on the same or similar facts. See also Gafford v. State, 387 So.2d 333 (Fla. 1980)(collecting cases and vacating sentence for reconsideration in light of accomplice's sentence). But, it is not the kind of rule which calls for the testimony proffered in this case as it has nothing to do with whether death is proportionate for the given offender in light of how his co-felons were treated.

Appellant's argument offers no reason for not following the careful and thoughtful analysis of this type of claim set out in Robinson v. Maynard, 829 F.2d 1501 (10th Cir. 1987). As the Robinson court points out, the logic of Booth v. Maryland, 482

U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and its progeny militates heavily against this type of evidence. Appellant's point that the evidence was relevant to the need for retribution misses the point. It is society's need for retribution that is part of the point in carrying out capital punishment not the immediate victims'.

Nor, is it fair to say that this court's prior opinion in this case can be read as determining that this was proper evidence for the purpose of mitigation. That evidence had gone to the jury and the state had not challenged its propriety on appeal. That it was mentioned in the opinion does not make it part of the decision. Whether Ann Shirley Anderson's testimony about her mother's opinion on capital punishment was relevant evidence in mitigation was not presented by case, nor was it briefed by the parties or argued. The question presented and argued was whether it was error for the court not to have given the instruction on nonstatutory mitigating circumstances despite the fact that it had not been requested. It would be strange, indeed, if a passing sentence in an opinion devoted to another issue could be read to create such a novel innovation in the law as appellant's argument under this point urges.

Appellant's point that the testimony should have been allowed to some how balance the fact that there were passing references to the victim's humanity does not make sense. But, more to the point, it is not properly before this court as it was not presented as a justification for the admission of the Ann

Shirley Anderson testimony about her mother's opposition to capital punishment. Trying to present it now runs a fou of the well settled and just recently reaffirmed prohibition against changing grounds on appeal. See Hill v. State, 549 So.2d 179, 182 (1989) To the extent that it amounts to a "back door" South Carolina v. Gathers, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); Booth v. Maryland, supra and Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989) claim, that claim too is procedurally barred by the absence of an appropriate objection in the trial court. Parker v. Dugger, 550 So.2d 459 (Fla. 1989). The state asks the court to make a "plain statement" so finding in light of Harris v. Reed, supra.

The rule appellant asks for is one that would open the way for juries to hear from all with knowledge of a case on what their opinion was regarding whether death was appropriate. Appellant is asking for a rule that would open the way for the investigative officers to come in and give their opinion on whether death was appropriate. He asks for a rule that moves away from the individualized determination based on the circumstances of the offense and the offender's individual record, background and character. The court must not start down this slippery slope.

ISSUE IV

WHETHER THE COURT ERRED PERMITTING THE STATE TO PRESENT TESTIMONY THAT APPELLANT HAD THREATEN TO GET A WITNESS WHO WAS GOING TO TESTIFY AGAINST HIM?

Appellant takes the position that it was error permit the state to present the testimony of Greg Anderson that appellant had threatened to "get" him after he learned that Anderson would be testifying against him in his first trial. And, appellant seeks to constitutionalize his claim for the first time on appea tacking on references to the state and federal constitutions at the end of his argument under this point. His constitutional claims have been procedurally defaulted. And, he is wrong on the merits of his evidentiary claim because the evidence was relevant to one of the aggravating factors the state was seeking to prove.

Appellant's arguments overlook and fail to consider that the Greg Anderson testimony was relevant to establishing the aggravating factor of the burglary beyond and to the exclusion of a reasonable doubt. That the murder was committed during the course of a burglary was relevant to the proof of the aggravating factor enumerated in Section 921.141(5)(d), Florida Statutes (1987). The jury knew of his conviction. But, it did not know the details. There is no reason the state should have been precluded from offering all relevant evidence tending to establish the existence of this aggravating factor.

Appellant's argument admits that threats such as the one at issue her are relevant citing Jones v. State, 385 So.2d 1042

(Fla. 1st DCA 1980). And, the argument is correct in that analysis. This court recognizes the relevancy of such evidence. See e.g. Dufour v. State, 495 So.2d 154, 159 (Fla. 1986), cert. denied, 487 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987)(reciting existence of such evidence as major element of case against defendant).

The threat evidence here was a direct threat by the defendant against a witness against him. It did not involve the third party threat pattern like that found in State v. Price, 491 So.2d 536 (Fla. 1986). And, it did not come into evidence like the third party threat in Price under a different guise. It was presented in this case as direct consciousness of guilt of the burglary. It did not go to any unauthorized aggravating factor like the situation presented in Elledge v. State, 346 So.2d 998 (Fla. 1977). Nor, was it evidence of a totally unrelated offense like the situation presenting Trawick v. State. 473 So.2d 1235 (Fla. 1985) (evidence of independent killing not relevant to establish heinous atrocious or cruel aggravating factor). Of course, the evidence was prejudicial. Relevant competent evidence in the state's case against a criminal is supposed to be prejudicial it the sense of establishing the offense. But, it was not unduly or unfairly prejudicial. And, the circuit court did not abuse his discretion in overruling appellant's objection.

Review of evidentiary rulings is pursuant to an abuse of discretion standard. Muehleman v. State, 503 So.2d 310, 315 (Fla.), cert. denied, ___ U.S. ___, 108 S.Ct. 39, 98 L.Ed.2d 170

(1987) (penalty phase case); Jent v. State, 408 So.2d 1024, 1029 (Fla.) cert. denied 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982) (guilt phase case). As the court noted in those cases, trial courts enjoy wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed.

The trial court did not abuse its discretion in so ruling because the evidence was relevant. Section 90.402, Florida Statutes (1987) authorizes that admission of all relevant evidence. Williams v. State, 110 So.2d 654 (Fla. 1959) specifically authorizes the admission of evidence of uncharged crimes when that evidence is relevant. The test for the admission or exclusion of such evidence is relevancy. Bryan v. State, 533 So.2d 744 (Fla. 1988). Here the evidence was plainly relevant to establish appellant's that appellant had committed his murder during the course of a burglary. He had confessed that burglary to Greg Anderson and then threatened to "get" him after he learned that Anderson would testify against him.

Appellant has also sought to constitutionalize this evidentiary claim by adding references to the state and federal constitutions at the end of the argument. This is a change in grounds from that presented below. And because the matter was not presented below it has been procedurally defaulted. See Hill v. State, supra. The state asks the court to make a "plain statement" so finding in light of Harris v. Reed, supra. and rests its descision soley on the procedural default.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF FLIGHT WHICH INCLUDED A REFERENCE TO APPELLANT'S HAVING BEEN IN JAIL PREVIOUSLY PERMITTING CROSS EXAMINATION AND EVIDENCE ABOUT HIS CRIMINAL HISTORY AFTER HE OFFERED EVIDENCE FROM A LONGTIME NEIGHBOR AND FAMILY FRIEND TO THE EFFECT THAT HE HAD NOT BEEN IN TROUBLE?

Appellant claims that it was error for the state to introduce his statement about his flight which included his mention of having previously been in jail. He takes the position that the evidence that he had previously been in jail was not relevant to any aggravating circumstance. The point is without merit because appellant's statement was relevant to proof of the flight which was relevant to proof of the burglary. And, the evidence of his prior criminal history became relevant to impeach the credibility of Thomas Snell. Appellant also seeks to constitutionalize his claim for the first time on appeal tacking on references to the state and federal constitutions at the end of his argument under this point. The constitutional dimension of the claim has been procedurally defaulted by the failure to raise it below.

The relevance of this evidence was litigated as the first issue in the prior appeal. And, the court specifically ruled on the claim. Floyd v. State, 497 So.2d 1211 (Fla. 1986). Ruling on the claim in the prior appeal, this court said:

> Floyd concedes that the state could present evidence of his flight at arrest. He argues, however, that the trial court erred in letting the jury hear that he had been

> incarcerated at a prior time. We disagree. The testimony was relevant to the issue of flight and was, therefore, admissable. 497 So.2d at 1213(emphasis supplied)

Appellant's argument suggests no new analysis calling into question the correctness of the court's prior ruling on this question. The court should continue with its ruling on this question.

Appellant's argument also takes the position that the state's introduction of his prior criminal record was error. As his argument correctly notes, his witness: Thomas Snell, a communications officer for the local police department (R. 871), neighbor and longtime friend and co-worker with appellant's father (R. 872-873); denied any knowledge of appellant every having been in trouble. (R. 873) After Snell repeated this denial on cross, (R. 878), the prosecution asked for and received an bench conference. (R. 879) He asked for and received a research recess. There was an extensive conference with discussion of the case law in this area. (880-891) Following the argument and review of the case law, the court ruled:

> Accordingly, at this point in time, the Court finds the defense has opened the door and that the State, if they so desire, may inquire as to knowledge regarding other criminal actions and whether that would change that opinion.
>
> (R. 892)

Following the conference, the state resumed cross-examination of the witness and he denied being aware of

appellant's previous criminal history. (R. 894-895) He also contended that he had not changed his opinion of appellant. During the discussion preceding the state's introduction of the records documenting the criminal history about which Snell had been cross-examined, appellant objected to them on the ground that they did not go to a statutory aggravating factor and that he believed the cross examination was enough. (R.936)

The cross-examination of Snell was proper and this type of cross examination has been approved by this court in penalty phase proceeding and the introduction of the documents is supported by Muehleman v. State, 503 So.2d at 315-316. While appellant, like Muehleman, may not have intended to rely on the mitigating factor or no significant prior criminal history, Snell injected his criminal history into the case. In Muehleman, this court approved the introduction of a "Juvenile Social History" detailing Muehleman's extensive juvenile criminal record. This court found no abuse of discretion in the admission of the evidence to rebut psychiatric evidence. While Snell is a layman, there is really no difference between what he was doing and his testimony and that of the mental health professional in Parker v. State, 476 So.2d 134, 139 (Fla. 1985). This court approved cross-examination of a mental health professional about his knowledge of Parker' criminal history in view of his testimony about Parker's non-violent nature.

Appellant also seeks to constitutionalize this evidentiary claim by adding references to the state and federal constitutions

at the end of the argument. This is a change in grounds from that presented below. And, because the matter was not presented below it has been procedurally defaulted. See Hill v. State, supra. The state asks the court to make a "plain statement" so finding in light of Harris v. Reed, supra, and rest its decision soley on the procedural default.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN PERMITTING POLICE OFFICERS TO OFFER OPINIONS THAT WERE WITHIN THEIR WORKING KNOWLEDGE DESPITE THAT LACK OF HIGHLY FORMAL EXPERT QUALIFICATION?

When looked at in the context of the trial, it is clear that there is no error arising out of the opinions rendered by the officers who did so. The court permitted the opinions in their capacity as police officers. And, appellant never challenged whether their qualifications or whether the opinions they rendered were beyond their experience. Settled authority finds no error even in less structured situations.

After Officer Olsen testified about the appearance of the room in which the victim's body had been found including his observations about knobs being knocked off and things being disturbed, appellant sought a bench conference. (R. 721) He did not interpose an objection but stated that he thought that the testimony was conjecture and prejudicial and apparently anticipated that there would be testimony that the scene looked like there had been a struggle. (R. 721-722) The court responded to his statements saying, "I am going to allow him to formulate those opinions as a police officer, and you can cross-examine him on this point if you so desire." (R. 722) Appellant made no objection to this procedure. And, while he cross-examined Olsen about the knobs being knocked off, (R. 729), and his opinion of the why the stab wound was a defensive wound (R. 729-7311, he did not cross-examine Olsen about his training and experience. Nor,

did he make further objection to what he now characterizes as Olsen's opinion testimony.

When Officer Gavin's testimony moved to how the room was messed up and he started to get into the nature of the wound, counsel did not object but said, "Judge before we get into this, I want to renew matters we have previously discussed." The court responded, "All right. It is noted. The same ruling by the court will be made. Proceed." (R. 739) When appellant cross-examined this witness, he did not explore his training and experience nor did he challenge his ability to draw the inferences he did, like the nature of one of the wounds as a defense wound.

Detective Engelke was the lead investigator on the case. He testified that he had been a police officer for thirteen years. (R. 817) He gave a description of how the investigation of the crime scene was conducted and what had been discovered. (R. 817-821) He testified that in his experience as a homicide detective he had been on over thirty crime scenes involving homicides. (822) When asked if he had formed a theory of how the homicide had happened based on the evidence at the scene, he responded that he had. He explained that that was an integral part of investigation saying, "Essentially, when we do investigate, we try to profile or come up with an idea of how something occurred.'' (R.822) When asked to give his theory of how the crime happened, appellant objected. (R. 822) His contention was that there was not a sufficient predicate. (R. 822) The court

overruled his objection. Engelke then testified in detail about what he though had happened in light of the physical evidence found at the scene. (R. 822-825) It included a detailed explanation of why he thought that the murder had happened during a creep-in burglary.

Appellant's argument takes the position that all of the testimony offered to which he makes objection came in violation of the provisions of the evidence code governing the use of opinion testimony. Significantly, the argument fails to address the trial court's authorization of these opinions in the witnesses' capacity as police officers. Appellant never challenged their training and experience to offer what he characterizes as opinions. Nor, did he question whether any opinions offered by them were beyond their experience.

The resolution of the claims appellant presents under this point are controlled by Johnston v. State, 497 So.2d 863, 870 (Fla. 1986) and like cases. In Johnston, this court found no error in a police officer's testimony about a Luminol test he had performed on the defendant's clothing despite the fact that he had never been qualified as an expert in the detection of blood where his testimony showed a working knowledge of the process. While the qualification process for Engelke was perhaps a little more formal than what is found in Johnston, even if it had not been done, it was clear that he had been doing homicide investigations and that forming the opinions that he gave was part of his work as a homicide investigator. It was well within

the area of working knowledge to which he testified. And, it was to that that this court looked in Johnston to determine that there was no error.

The opinions offered by the other officers were within the area of working knowledge for a police officer. Specifically, almost anyone who works in the area of criminal law is going to be familiar with the concept of defensive wounds and recognize one when he or she sees it. The defensive wound testimony of the officers does not differ materially from the policeman's testimony in Jones v. State, 440 So.2d 570 (Fla. 1983) that a mark on the windowsill of a "stash house" was made by the recoil of a high powered rifle.

Appellant also seeks to constitutionalize this evidentiary claim by adding references to the state and federal constitutions at the end of the argument. This is a change in grounds from that presented below. And, because the matter was not presented below it has been procedurally defaulted. See Hill v. State, supra. The state asks the court to make a "plain statement" *so* finding in light of Harris v. Reed, supra and to rests its decision on the constitutional dimension of the claim soley on the procedural default.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT TO READ STATUTORY AGGRAVATING FACTORS TO THE JURY DURING HIS CLOSING ARGUMENT WHICH HAD NO APPLICABILITY TO THIS CASE?

Under this point, appellant's argument contends that the trial court erred in not permitting him to argue the absence of statutory aggravating circumstances as a mitigating circumstance. But, that is not exactly what happened. Even if it had, it would not provide a justification for reversing this death sentence because it was not proper argument.

What the record supports is that appellant was precluded from reading the statutory aggravating factors which had no arguable application to this case. (R. 1010) He was permitted to argue that the state would only be able to establish in this case two of the nine. (R. 1011)

Appellant contends that by prohibiting such argument the trial court violated the principles embodied in Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978) Appellant also contends that even if the error were not of constitutional magnitude that it was error as this type of argument has a foundation in the decisions in Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (Fla. 1985) and Ross v. State, 474 So.2d 11709 (Fla. 1985). Reference to the argument actually presented and

the law on which appellant bases his conclusion shows that his argument is totally without merit.

Lockett, Eddings and Skipper do indeed stand for the proposition that the Eighth Amendment forbids exclusion from the sentencer's consideration evidence that might "serve as a basis for a sentence of less than death. Skipper, 90 L.Ed.2d at 7 But, the court's decision not exclude any such evidence.

Although appellant was not allowed to go into the exact nature of the irrelevant statutory aggravating circumstances, he was allowed to argue that only two of nine possible was present in this case. (R. 1011) Nor, was he precluded from making the argument he suggests grows out of the Rembert line of cases, that just because aggravating factors exist a jury need not find death is warranted.

The trial court correctly sustained this objection because the comment to which it was addressed invited a simple counting and thus invited the jury to stray from their duty of not just counting but weighing those factors that had been presented to them on the question of punishment. See Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978)(counting improper). Had appellant wished to make the argument appellate counsel now urges that the court's ruling on reading the irrelevant statutory aggravating circumstances precluded him from making, he certainly could have. He had all the tools at his disposal. Subject to the sound discretion of the trial court, counsel are afforded wide latitude in making arguments to the jury. Breedlove v. State, 413 So.2d 1,

8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). But, counsel may not contravene the jury instructions in arguing to the jury. Cave v. State, 476 So.2d 180, 187 (Fla. 1985). The court was not going to read the inapplicable instructions. Counsel had no business reading them. There was no abuse of discretion in the court's ruling on this question.

ISSUE VIII

WHETHER THE COURT ERRED IN INSTRUCTING ON AND FINDING THAT THE OFFENSE HAD BEEN COMMITTED FOR PECUNIARY GAIN AND WAS HEINOUS ATROCIOUS OR CRUEL?

Under this point in his brief the appellant takes the position that the court erred in instructing the jury on and then in finding two aggravating factors which this court found in its prior decision in the case that the evidence supported and had not been erroneously found. Appellant's points are without merit.

PECUNIARY GAIN

Appellant's argument takes the position that the proof of the pecuniary gain factor failed to exclude a reasonable doubt. Although this court, reviewing the same evidence in the prior appeal, left the finding of this aggravating factor undisturbed, 497 So.2d at 1213, appellant's argument, nevertheless, suggests that the checkbook could have been taken as an afterthought. But, that is not consistent with what is known about the crime. This was a day time burglary. The evidence is devoid of any suggestion that rape or some other felony was the purpose of the burglary. Appellant departed with the victim's checkbook and almost immediately began writing large checks on the account.

The facts presented by the evidence in this case are not at all like those cited in appellant's argument. Unlike the situation presented in Hill v. State, supra, where there was a statement made before the attack indicating that rape and mayhem

were the motivating factors for the crime and that the taking of the money was only an afterthought, there was no evidence suggesting that rape was the motivating factor for this offense. The only plausible motive for this burglary was theft and the subsequent use of the checkbook corroborates it. The same can be of the situation presented in Scull v. State, 533 So.2d 1137 (Fla. 1988), another case appellant's argument relies on. That record contained nothing to suggest that the victim had been murdered for her car. It was consistent with the car having been taken to facilitate escape.

Simmons v. State, 419 So.2d 316 (Fla. 1982) is an even more remote precedent. The setting for that case was a love triangle. And, the evidence the trial court had relied on really did not show that Simmons expected to gain financially by the murder. This case does not contain any suggestion that passion played a role in the relationship between appellant and his victim.

This evidence tells the story of a man trying to steal being caught and then killing. That he left behind the purse with a few dollars in it is not inconsistent with the pecuniary gain. At best, it is consistent with his leaving in a hurry and carrying away the most valuable item he had already discovered.

HEINOUS ATROCIOUS OR CRUEL

The court's prior finding to the contrary notwithstanding, 497 So.2d at 1214, appellant contends that the trial court erred in finding that the offense was especially heinous atrocious or cruel. Appellant reasons from the proposition that murder by

stabbing is not uncommon and that not all stabbing deaths qualify as heinous atrocious or cruel. However those propositions may be true or accurate, they do not dictate that no stabbing deaths can be heinous atrocious or cruel. To argue otherwise is to pursue bad logic. It is to the particular facts of the offense that we are to look in deciding whether a particular homicide fits this aggravating factor.

In upholding the existence to this aggravating factor in the prior appeal, this court looked to the findings that she died of a deep stab wound, had experienced a defensive wound and had remained alive for the multiple stab wounds to her torso. The facts have not changed. And, the trial court findings are substantially the same now as they were when this case first came before this court. There is the finding of the defensive wound, the multiple stab wounds, the evidence of struggle and the inference that she suffered while struggling for her life. (R. 334)

The facts have not changed and the law has not changed. And, there is precedent in other cases for finding that appellant's actions toward his victim set this crime apart from the norm, that this was a conscienceless and pitiless offense which was unnecessarily tortuous to the victim. It still fits the explanation of this aggravating factor first given in State v. Dixon, 283 So.2d 1, (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950,40 L.Ed.2d 295 (1974). It is in keeping with other cases where there have been similar facts. Johnston v. State, 497

So.2d at 871 (84 year old woman stabbed to death in her own bed); Wright v. State, 473 So.2d 1277 (Fla. 1985)(multiple stab wounds on body of 75-year old woman), cert. denied, ___ U.S. ___, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986).

ISSUE IX

WHETHER THE COURT ERRED IN HIS ANALYSIS OF THE MITIGATING EVIDENCE APPELLANT CONTENDS THAT THE RECORD SUPPORTS?

Appellant's argument takes the position that the trial court erred in its treatment of the mitigating evidence presented because there are not specific referees to matters appellant now wants to be given weight. Appellant's point is without merit because the trial court was aware of his responsibilities and the record gives ample evidence of that he did not refuse to consider anything proffered as mitigating.

It is quite clear that the judge followed the law to the letter in this regard. His remarks at the sentencing hearing make it quite clear that he did not refuse to consider anything proffered as mitigating. In his analysis of what had been offered as non statutory mitigating evidence he said:

> Any other aspect of the defendant's character or record or any other circumstance of the offense. Well, stop and think about what has been brought out in sentencing today. First from you, because no one had ever heard from you before today. There is some remorse that I see. There is a desire to live within the confines of the rules while you're in custody. There is a suggestion that you would like to help other prisoners with their problems. A desire to establish a rapport with your children. Quite frankly Mr. Floyd, those do not qualify to the court as the type of mitigation contemplated. Certainly, if there is some type of mitigation there, it is totally outweighed. I personally can not find any mitigation in those factors whatsoever that were brought out at sentencing today. Therefore, as I total up all the mitigating factors, there are none. (R.1071)

The written sentencing order is clear that the trial judge did not refuse to consider as mitigating that which was proffered as mitigating. In addressing nonstatutory mitigation the court below wrote:

> This mitigating factor was instructed to the jury as was required on by the Florida Supreme Court in its opinion in Floyd v. State, 497 so.2d 1211 (Fla. **1986).** This mitigating factor is a "catch all" and encompasses almost any mitigating information that the Defendant wishes to present to the jury and/or the Court. The jury had the opportunity to consider facts in addition to those that comprise statutory aggravating and mitigating circumstances. Further, this court heard everything at the sentencing hearing that the defendant chose to present. This Court now finds that sufficient mitigating circumstances which would require a lesser penalty do not exist. (R. 336)

This court's recent decision Hill, supra considered a similar attack on the sentencing order in that case predicated on Rogers v. State, supra where the claim was that neither the judge nor the jury had accorded sufficient weight to Hill's mother testimony. The court rejected his claim pointing to long standing precedent ruling, "So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." **549** So.2d at **183** (citations omitted). The court was faithful to this court's command. That appellant is not satisfied with the circuit court's decision does not make it incorrect or subject to reversal in this court.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority appellee asks the court to enter a decision affirming the sentence of death and making a "plain statement" rejecting all arguments advanced by appellant which have been procedurally defaulted resting the court's decision on those issues exclusively on the procedural bar found to exist.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON JR.
Assistant Attorney General
Florida Bar No. 160260
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail, postage prepaid, to Robert F. Moeller, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow Florida 33830-9000, on this 18th day of January 1990.

COUNSEL FOR APPELLEE